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No. 08-505

In the Supreme Court of the United States

CCA ASSOCIATES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether legislation regulating the prepayment of loans insured by the Department of Housing and Urban Development (HUD) effected a physical or per se taking of private property requiring just compensation under the Fifth Amendment.

2. Whether, under the takings analysis set forth in *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978), a court evaluating the economic impact of legislation regulating the prepayment of HUD-insured loans should take into account both the offsetting benefits provided by the legislation and the legislation's economic effects on the value of the property as a whole.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is not published in the *Federal Reporter* but is reprinted at 284 Fed. Appx. 810. The opinion of the Court of Federal Claims (Pet. App. 4a-94a) is reported at 75 Fed. Cl. 170.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 2008. The petition for a writ of certiorari was filed on October 15, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Since 1968, Section 221(d)(3) of the National Housing Act, 12 U.S.C. 1715*l*(d)(3), has authorized the Department of Housing and Urban Development (HUD)

to stimulate the private development of moderate- and low-income housing by providing mortgage insurance and funding for below-market-interest-rate loans. Under the Section 221(d)(3) Program, a private developer enters into a "regulatory agreement" with HUD whereby the owner accepts specific restrictions on the mortgaged property, including restrictions on tenant income, allowable rental rates, and cash distributions that could be received from the project. Pet. App. 8a; see generally *Cienega Gardens* v. *United States*, 331 F.3d 1319, 1325-1326 (Fed. Cir. 2003) (*Cienega VIII*). The regulatory agreement remains in effect as long as the property is subject to the insured mortgage, and the mortgage note prohibits prepayment of the mortgage without the government's approval for the project's first 20 years. Pet. App. 9a-10a.

b. In the late 1980s, as the 20-year anniversary approached for many Section 221(d)(3) properties, Congress became concerned that many owners would prepay their mortgages, triggering a dramatic drop in the Nation's supply of low-income housing. Pet. App. 11a; see, *e.g.*, H.R. Conf. Rep. No. 426, 100th Cong., 1st Sess. 192 (1987) (*1987 Conf. Rep.*). In 1988 and 1990, Congress enacted two statutes, the Emergency Low Income Housing Preservation Act (ELIHPA), Pub. L. No. 100-242, Tit. II, 101 Stat. 1877, and the Low Income Housing Preservation and Resident Homeownership Act of 1990 (LIHPRHA), 12 U.S.C. 4101 *et seq.* (collectively, the Preservation Statutes), to preserve low-income housing.

ELIHPA contained a two-year sunset provision and instituted a permitting process under which owners interested in prepaying their mortgages were required to apply to HUD for approval. §§ 221-223, 101 Stat. 1878.

That enabled HUD, using the agency's knowledge and expertise, to assess whether a project's preservation as low-income housing was warranted. *1987 Conf. Rep.* 194. As an alternative to prepayment, Congress authorized various financial benefits available to owners, including a government-insured, equity-take-out loan, increased annual cash distributions, housing assistance contracts, and financing for capital improvements. ELIHPA §§ 224(b), 231, 101 Stat. 1880, 1884. In exchange for those financial benefits, owners agreed to extend existing use restrictions on the property. ELIHPA § 225(b), 101 Stat. 1881. ELIHPA also authorized HUD to facilitate a project's sale to a qualified nonprofit organization. § 224(b)(7), 101 Stat. 1880. Participation by owners in the preservation process was voluntary. Pet. App. 15a.

Like its predecessor, LIHPRHA vested HUD with regulatory jurisdiction over prepayment, required owners to seek approval to prepay their HUD-insured mortgages, and provided opportunities to exit the program or to seek monetary benefits in the event of a denial of prepayment. 12 U.S.C. 4101(a), 4108-4110, 4114. LIHPRHA also allowed an owner to sell property to a "qualified purchaser[]" at the "fair market value of the housing based on the highest and best use of the property," *i.e.*, the project's market value *without* HUD restrictions. 12 U.S.C. 4103(b)(2), 4110(b)(1). To facilitate such sales, which would entirely release owners from the program, HUD funded virtually all transaction costs and provided loans that enabled non-profit organizations to acquire projects. 12 U.S.C. 4110(d). An owner seeking to sell would be allowed to prepay and exit the program if it could not complete a sale under the program. 12 U.S.C. 4114(a)(1)(B); Pet. App. 20a.

Like ELIHPA, LIHPRHA permitted HUD to offer owners financial incentives to extend their properties' use restrictions. 12 U.S.C. 4109. HUD could provide owners rent increases, an increased rate of return, access to project equity through a government-insured loan, and financing for capital improvements. *Ibid.*

c. The Preservation Statutes were criticized for their generous provisions and cost to the government. Pet. App. 131a. Such concerns ultimately resulted in passage of the Housing Opportunity Program Extension Act of 1996 (HOPE Act), Pub. L. No. 104-120, 110 Stat. 834. Although the HOPE Act did not expressly repeal LIHPRHA, it "restored the prepayment rights to owners" of moderate- and low-income housing. *Chancellor Manor* v. *United States*, 331 F.3d 891, 896 (Fed. Cir. 2003); see Pet. App. 22a.

2. Petitioner owns Chateau Cleary Apartments, a moderate-income apartment complex outside New Orleans that was developed under HUD's Section 221(d)(3) Program. Pet. App. 24a-31a. In 1969, petitioner's predecessors decided to build and operate the complex. *Id.* at 25a. Pursuant to a regulatory agreement, HUD insured a 40-year loan for $1,601,100 at a below-market interest rate, and two years later it insured a larger mortgage of $1,699,500. *Id.* at 25a-27a.

In 1991, when petitioner had completed 20 years in the Section 221(d)(3) Program, the property was subject to ELIHPA and LIHPRHA. Petitioner was free to choose among the options available under the Preservation Statutes. Despite being advised that it was eligible for reduced regulation and significant incentives, and despite being aware that a non-profit organization was interested in purchasing Chateau Cleary in order to preserve it as affordable housing, petitioner chose not to

take the actions necessary to seek incentives or permission to sell the property. Pet. App. 29a. In September 1998, after the enactment of the HOPE Act, petitioner prepaid the remainder of its mortgage and exited the Section 221(d)(3) Program. *Id.* at 30-31a.

3. On May 13, 1997, petitioner filed suit in the Court of Federal Claims (CFC), asserting breach of contract and takings claims against the United States. Pet. App. 31a. In 1998, the CFC stayed proceedings pending the resolution of other cases involving similar challenges to the Section 221(d)(3) Program. In 2001, the Federal Circuit held in *Cienega Gardens* v. *United States*, 265 F.3d 1237 (*Cienega VI*), that the Preservation Statutes did not amount to a physical invasion, and thus did not constitute a per se taking. In 2003, the Federal Circuit issued further decisions and remand orders in *Cienega VIII*, and *Chancellor Manor*. The CFC then lifted its stay in this case, and the suit proceeded to trial. Pet. App. 31a.

Meanwhile, the CFC also held trials in *Cienega Gardens* and *Chancellor Manor*. The court concluded in those cases that the government had temporarily taken the plaintiffs' contractual rights to prepay their mortgages. On November 22, 2005, the CFC entered judgment for those plaintiffs. *Cienega Gardens* v. *United States*, 67 Fed. Cl. 434 (2005), vacated, 503 F.3d 1266 (Fed. Cir. 2007). The United States appealed both judgments.

In September 2006, the CFC in this case held an eight-day trial on petitioner's as-applied, regulatory-taking claim. The court issued its opinion and entered judgment on January 31, 2007. Pet. App. 4a-94a. Based on its analysis under the framework set forth in *Penn Central Transportation Co.* v. *New York City*, 438 U.S.

104 (1978) (*Penn Central*), the CFC held that the government had temporarily taken petitioner's right to prepay its HUD-insured mortgage. Pet. App. 47a-77a. The court awarded $841,839 in compensation plus interest. *Id.* at 93a-94a.

4. The United States appealed. After the government had filed its initial brief, but before petitioner had filed its brief as appellee, a specially-assembled seven-judge panel of the Federal Circuit decided the appeals in *Cienega Gardens* and *Chancellor Manor*. See *Cienega Gardens* v. *United States*, 503 F.3d 1266 (2007) (*Cienega X*), cert. dismissed, 129 S. Ct. 17, and 129 S. Ct. 18 (2008). A six-judge majority of that panel vacated the judgments and remanded the cases "for a new *Penn Central* analysis under the correct legal standard." *Id.* at 1291. The court based its remand on four conclusions that are relevant here.

First, noting that the CFC had only "compared the rate of the return that the owner would receive on its investment with and without the restriction of a single year," the Federal Circuit held that the CFC had erred in failing to take into account the effect of the restriction on the property as a whole. *Cienega X*, 503 F.3d at 1280. The court observed that different methodologies might be used to measure that impact, and it directed the CFC on remand to consider all possible alternatives. *Id.* at 1282.

Second, the Federal Circuit held that the CFC had erroneously failed to consider the offsetting benefits that the statutory scheme afforded, which were specifically designed to ameliorate the effect of the prepayment restrictions. *Cienega X*, 503 F.3d at 1283-1284. The court recognized in particular that "[t]he sale and use agreement options * * * conferred considerable

benefits on the owners." *Id.* at 1286. The court concluded that, "[i]n considering whether the owners that elected to enter into use agreements suffered a taking, available offsetting benefits must be taken into account generally, along with the particular benefits that actually were offered to the plaintiffs." *Id.* at 1287.

Third, the Federal Circuit held that the CFC had erred in not considering the duration of the legislation. It directed that, "[o]n remand, the court must consider that the owners * * * were only subjected to the legislation for a limited period of 19 to 27 months." *Cienega X*, 503 F.3d at 1288.

Finally, the Federal Circuit held that the CFC had erred in its treatment of the investment-backed-expectations prong of the *Penn Central* analysis. *Cienega X*, 503 F.3d at 1288. Although it found no error in the CFC's conclusion that the owners had subjectively expected to be allowed to prepay their mortgages after 20 years, it held that the CFC had erred "in part in its analysis of the reasonableness of the plaintiffs' expectations." *Ibid.*

In its brief below, petitioner specifically addressed the analysis and holdings of *Cienega X*, Pet. C.A. Br. 16-18, 41-55, as the government did in its reply brief, Gov't C.A. Reply Br. 17-31. After oral argument, the court of appeals vacated the CFC's judgment in this case and remanded for further proceedings in accordance with *Cienega X*. Pet. App. 1a-3a. The court specifically noted that, on remand, "both sides" should be allowed "to supplement the record with additional relevant evidence if they wish to do so." *Id.* at 3a (quoting *Cienega X*, 503 F.3d at 1291).

ARGUMENT

Petitioner's challenge to the court of appeals' interlocutory decision depends in part upon a physical-taking argument that was not pressed or passed upon below and is not supported by this Court's cases. The complexity of LIHPRHA, and the fact-specific nature of HUD's application of the statute to individual owners, make the use of rigid categorical-taking tests inappropriate in this context. The guidance that the Federal Circuit provided for application on remand of the ad hoc, fact-based regulatory-taking analysis prescribed by *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978) (*Penn Central*), is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. As a threshold matter, petitioner's challenge to the court of appeals' decision is premature because that decision is interlocutory. The case was "remand[ed]" to the CFC "for further consideration in accordance with *Cienega X*," with instructions that "'both sides'" be allowed to "'supplement the record with additional evidence.'" Pet. App. 3a (quoting *Cienega Gardens* v. *United States*, 503 F.3d 1266, 1291 (Fed. Cir. 2007) (*Cienega X*), cert. dismissed, 129 S. Ct. 17, and 129 S. Ct. 18 (2008)). Although petitioner suggests that "there will be no percolation" of the relevant issues in the lower courts, Pet. 36, and further contends that the Federal Circuit's decision "would deny just compensation for virtually all temporary regulatory takings," Pet. 35-36, petitioner does not assert that it has no arguments to press on remand. If, on remand, petitioner satisfies the economic-impact analysis prescribed by *Cienega X*, the predicates for its current petition will be rendered moot. By contrast, if petitioner fails to establish that it had

reasonable investment-backed expectations (an aspect of *Cienega X*'s formulation of the *Penn Central* test that petitioner does not currently challenge), its objections to the Federal Circuit's economic-impact analysis might be altogether unavailing.

Because petitioner's need for legal relief is contingent on the ultimate resolution of the case on remand, this Court should follow its general practice of "await[ing] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (Scalia, J., opinion respecting the denial of certiorari). That will not prevent petitioner from "raising the same issues in a later petition, after final judgment has been rendered." *Ibid.* It will, however, ensure that this Court would evaluate the lower courts' analysis only if it became "absolutely necessary" to address petitioners' constitutional arguments, *Ashwander* v. *TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (quoting *Burton* v. *United States*, 196 U.S. 283, 295 (1905))—and only upon a full record, which is a particularly appropriate concern in light of the "fact specific inquiry" that the Court has prescribed in the "regulatory taking context," *Tahoe-Sierra Pres. Council, Inc.* v. *Tahoe Reg'l Planning Agency*, 535 U.S. 302, 332 (2002) (*Tahoe-Sierra*).

Review by this Court at the current interlocutory stage would be particularly inappropriate in light of the sequence of events that culminated in the decision below. The bulk of the petition for a writ of certiorari is in substance a request that this Court review the legal analysis set forth in the Federal Circuit's decision in *Cienega X*. To this point, however, *no* court has applied the *Cienega X* framework to the circumstances of petitioner's own case.

2. Petitioner contends (Pet. 22) that the Federal Circuit erred in 2001 when it concluded that LIHPRHA should be analyzed as a potential regulatory taking rather than as a "[f]orced [p]hysical [o]ccupation" of real property. See *Cienega Gardens* v. *United States*, 265 F.3d 1237, 1248-1249 (*Cienega VI*); see generally *Lingle* v. *Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005) (describing the difference between physical invasions and regulatory takings). That contention is not properly before this Court because petitioner did not raise the issue in the courts below. In any event, petitioner's contention lacks merit and does not warrant further review.

a. Petitioner advances its physical-taking argument for the first time in this Court. Its sole contention in the CFC was that the application of LIHPRHA to petitioner's property constituted a *regulatory* taking. See, *e.g.*, Pet. App. 44a, 76a. As a result, the government did not present evidence (such as proof that the owners of Chateau Cleary were free to rent to qualifying tenants of their choice and were free to refuse to rent to tenants) responsive to a physical-taking theory. On appeal, petitioner did not raise a physical-taking argument as an alternative basis for affirming the CFC's compensation award. To the contrary, it noted in passing—and without registering any objection—that the Federal Circuit in another case had "rejected the argument [that] ELIHPA and LIHPRHA effected a *per se* taking through an actual physical occupation." Pet. C.A. Br. 40 n.21. In remanding the case for further proceedings in the CFC, the Federal Circuit did not discuss the possibility that those statutes had effected a physical taking of petitioner's property.

This Court generally declines "to allow a petitioner to assert new substantive arguments attacking, rather

than defending, the judgment when those arguments were not pressed in the court whose opinion we are reviewing, or at least passed upon by it." *United States* v. *United Foods, Inc.*, 533 U.S. 405, 417 (2001). It should follow that general practice with respect to petitioner's physical-taking argument.[1]

b. Even if petitioner's physical-taking argument had been pressed or passed upon in the courts below, and were thus suitable for consideration by this Court, it lacks merit.

Petitioner argues that the Preservation Statutes effected a per se taking under *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), because they "*required* [petitioner] to submit to the physical occupation" of its property, "against its will," by "low-income tenants" beyond the 20-year period for which it had "agreed to lodge low-income tenants." Pet. 22, 24. The categorical rule announced in *Loretto*, however, applies only to *permanent* physical occupations of private property. See 458 U.S. at 432 n.9; see also *Lingle*, 544 U.S. at 538 (explaining that per se takings occur when, *inter alia*, "the government requires an owner to suffer a permanent physical invasion"). Because the restrictions imposed by LIHPRHA were indisputably

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[1] Petitioner asserts in passing (Pet. 19 n.11) that "[t]he 'physical takings' issue is properly before this Court" in light of *Yee* v. *City of Escondido*, 503 U.S. 519 (1992). In *Yee*, the Court noted that, having presented a taking "claim" in the state court, the petitioners there could present either physical- or regulatory-taking "arguments" in support of that claim in this Court. *Id.* at 534-535. The Court nevertheless declined to address petitioners' regulatory-taking argument because that argument was not fairly included within the question presented. *Id.* at 535-538. The Court explained in that regard that "[p]rudence also dictate[d] awaiting a case in which the issue was fully litigated below." *Id.* at 538.

temporary, see Pet. 11 (acknowledging that the HOPE Act restored its contractual prepayment right), the rule announced in *Loretto* would be inapposite here, even if those restrictions were tantamount to a physical occupation of petitioner's property.

Moreover, LIHPRHA did not altogether eliminate owners' rights to devise their property or exclude others, even for a temporary period. It simply regulated their *contractual options* to prepay their mortgages. Cf. *United States* v. *Riverside Bayview Homes*, 474 U.S. 121, 126 (1985) ("[T]he mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking."). LIHPRHA explicitly allowed owners to prepay their mortgages upon certain conditions, and it allowed owners to sell their property and exit the program.

Even if the sale and incentive options are disregarded, LIHPRHA was more like a rent-control statute than a physical invasion. Such statutes do not effect categorical takings under *Loretto*. See, *e.g.*, *Yee* v. *City of Escondido*, 503 U.S. 519, 528-529 (1992). As the Court summarized in *Tahoe-Sierra*, a government regulation that "merely *prohibits landlords from evicting tenants* unwilling to pay a higher rent" or "bans certain private uses of a portion of an owner's property * * * does not constitute a categorical taking." 535 U.S. at 322-323 (emphasis added; citations omitted). Here, property owners maintained control of their apartments, including the ability to manage their property, turn away prospective tenants, and sell the property at market value. 12 U.S.C. 4110.

Petitioner's reliance (Pet. 23-24) on *Yee*, *supra*, and on *FCC* v. *Florida Power Corp.*, 480 U.S. 245 (1987), is misplaced. The Court in *Yee* suggested that a categori-

cal taking might occur if an owner were compelled "to refrain *in perpetuity* from terminating a tenancy," 503 U.S. at 528 (emphasis added), but nothing in LIHPRHA imposed such a long-term requirement. Moreover, in both *Yee* and *Florida Power Corp.*, this Court recognized a crucial distinction between tenants who are initially invited in by the owner (as here), and those who are forced upon the owner by the government. See *ibid.*; *Florida Power Corp.*, 480 U.S. at 252-253. As in those cases, LIHPRHA's regulations on the use of petitioner's property were not tantamount to physical occupations that would trigger *Loretto*'s per se analysis. *Yee*, 503 U.S. at 539; *Florida Power Corp.*, 480 U.S. at 253.

3. Petitioner argues (Pet. 24-27) that the Federal Circuit in *Cienega X* has called for an overly "[r]igid" application of *Penn Central*'s requirement that the court adjudicating a regulatory-taking claim must evaluate the pertinent regulation's economic impact. In particular, petitioner contends that the Federal Circuit erred by requiring the CFC (a) to take into account both the burdens and the benefits that property owners accrued under LIHPRHA (Pet. 28-31), and (b) to consider the effect that LIHPRHA had on the value of the property over its "entire useful life" (Pet. 31-36) (quoting *Cienega X*, 503 F.3d at 1282). Contrary to petitioner's assertions, those aspects of the decision in *Cienega X* are consistent with this Court's precedents.

a. In determining whether a government action effects a regulatory taking, this Court's precedents call for "essentially ad hoc, factual inquiries, designed to allow careful examination and weighing of all the relevant circumstances." *Tahoe-Sierra*, 535 U.S. at 322 (citations and internal quotation marks omitted). In *Penn Cen-*

tral, the Court identified three factors "that have particular significance" in such inquiries: the "character of the governmental action," the "economic impact of the regulation on the claimant," and "the extent to which the regulation has interfered with distinct investment-backed expectations." 438 U.S. at 124. Petitioner's approach would artificially cabin the factors that a court could consider in evaluating a regulation's "economic impact." This Court's cases do not support that blinkered approach.

b. The court of appeals in *Cienega X* concluded that the CFC, in considering the economic impact of the Preservation Statutes, had erroneously ignored the benefits and alternatives that those statutes made available to property owners. See 503 F.3d at 1282-1287. Petitioner contends that taking account of the benefits (including the "sale" and "use agreement" options) that LIHPRHA provided to owners "will eviscerate the requirement that the government pay just compensation for regulatory takings." Pet. 27; see Pet. 27-31. That argument reflects a misunderstanding of the *Penn Central* analysis.

The "essentially ad hoc, factual inquiries necessary to determine whether a regulatory taking has occurred," *Yee*, 503 U.S. at 529 (citation and internal quotation marks omitted), are ultimately directed to the question whether the regulation in question "goes too far," *ibid.* (quoting *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922)), or (as petitioner elsewhere acknowledges, see Pet. 25) whether the "severity of the burden that government imposes upon private property rights" is "functionally equivalent to the classic taking in which government directly appropriates private property," *Lingle*, 544 U.S. at 539. In evaluating how "far" a regu-

lation "goes," it would make no sense to judge the burdens that it imposes in isolation from any related benefits that it provides.

Indeed, this Court acknowledged as much in *Penn Central* itself. In considering the restrictions that the New York City Landmarks Preservation Law imposed on the development of designated landmarks, the Court also took into account the transferrable development rights that the law granted to the owners of a designated landmark and its adjacent properties:

> While these [transferrable development] rights may well not have constituted "just compensation" if a "taking" had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of the regulation.

Penn Central, 438 U.S. at 137. Similarly, in cases involving land-use restrictions, no regulatory taking occurs when "the legislature is simply 'adjusting the *benefits and burdens* of economic life' in a manner that secures an 'average reciprocity of advantage' to everyone concerned." *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1017-1018 (1992) (quoting *Penn Central*, 438 U.S. at 124, and *Mahon*, 260 U.S. at 415) (emphasis added); see *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 491 (1987) ("While each of us is burdened somewhat by [property-use] restrictions, we, in turn, benefit greatly from the restrictions that are placed on others."). If regulatory-taking analysis properly takes into account offsetting advantages that a landowner derives from restrictions imposed on the use of neighboring parcels, it should also take account of

benefits that the challenged regulatory regime *directly* confers upon the plaintiff.

In this case, LIHPRHA restricted, but did not eliminate, a project owner's right to transfer its property. 12 U.S.C. 4110. Nor did it prevent an owner from benefitting from the property's residual value. See *Penn Central*, 438 U.S. at 136 (no taking occurs where the regulation does not interfere with the ability to obtain a "reasonable return" on the owner's investment). An owner could benefit from the property's residual value by selling the property at a price based upon its appraised conventional market value, or by accepting an equity takeout loan and earning higher annual dividends based upon the project's appraised market-rate value. 12 U.S.C. 4109, 4110, 4114.

In arguing that the statutory alternatives are irrelevant to the regulatory-taking inquiry, petitioner relies primarily (Pet. 29-31) upon Justice Scalia's concurring opinion in *Suitum* v. *Tahoe Regional Planning Agency*, 520 U.S. 725 (1997). The transferable development rights at issue in *Suitum*, however, were not comparable to the sale or incentive options provided by LIHPRHA because those development rights had "nothing to do with" the owner's use of the relevant property, and were instead entirely separate rights granted to the owner by the agency. *Id.* at 747 (Scalia, J., concurring). By contrast, the statutory options to sell or to seek incentives that LIHPRHA provides relate directly to permissible *uses* of the owner's property and therefore relate to the impact of LIHPRHA on the owners' property rights.

For similar reasons, petitioner is wrong in contending (Pet. 27-28) that the Federal Circuit's decision in *Cienega X* will "eviscerate" regulatory-takings law by allowing the government to avoid a taking by paying

merely partial compensation to an owner. LIHPRHA's statutory options are alternative uses available to the owner, not separate rights to use another property or to receive cash payments from the government. Moreover, because the sale option merely regulated an existing use of petitioner's property, it could not be construed as a "new" or separate right granted as "compensation" for the restrictions upon the prepayment opportunity. In fact, pursuing the statutory options could have resulted in the exercise of the right to prepay. 12 U.S.C. 4114. Because the statutory options regulated the owner's use of its property (rather than compensating the owner), it is appropriate to consider them in evaluating the value of the owner's property as regulated.[2]

c. Petitioner also challenges (Pet. 31-36) the Federal Circuit's holding in *Cienega X* that the CFC's assessment of economic impact should include consideration of the effect that a regulatory restriction has on the petitioner's property interest "as a whole."[3] See 503 F.3d at

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[2] Petitioner contends (Pet. 28) that the court in *Cienega X* "disregarded" prior Federal Circuit precedents pertaining to the consideration of a regulation's offsetting benefits. In fact, the *Cienega X* court expressly distinguished those cases. See 503 F.3d at 1283-1284 & n.14. In any event, an intra-circuit conflict would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

[3] Petitioner focuses on the Federal Circuit's reference to considering a regulation's effect on total net income "over the entire useful life of the property." Pet. 31 (quoting *Cienega X*, 503 F.3d at 1282). In fact, *Cienega X*'s holding was about the necessity of considering "the economic impact of the regulation on the value of the property as a whole." 503 F.3d at 1282. Although the court mentioned the "useful life of the property" as one of two alternative approaches that could potentially be used for that analysis, it instructed the CFC to consider both of those approaches "as well as any other possible approaches" on

1280. As this Court explained in *Concrete Pipe & Products of California, Inc.* v. *Construction Laborers Pension Trust*, 508 U.S. 602 (1993), however, "a claimant's parcel of property [cannot] first be divided into what was taken and what was left for purposes of demonstrating the taking of the former to be complete," *id.* at 644. That approach would be "quite simply untenable," *Penn Central*, 438 U.S. at 130, because "[t]o the extent that any portion of property is taken, that portion is always taken in its entirety," *Concrete Pipe & Prods.*, 508 U.S. at 644 (citing *Keystone Bituminous Coal Ass'n*, 480 U.S. at 497). Because a property interest may be divided temporally as well as physically, the same reasoning applies to temporary regulatory takings that affect the value of an owner's property interest for only a limited period of time. Restricting the economic-impact analysis to the period of the alleged taking would evade the Court's "parcel as a whole" rule by transforming every "delay" into a "total ban." *Tahoe-Sierra*, 535 U.S. at 331; see *id.* at 342 (holding that the "duration of the [land-use] restriction is one of the important factors that a court must consider in the appraisal of a regulatory takings claim").[4]

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remand. *Ibid.*; see p. 6, *supra*. That open-ended instruction is yet another illustration of the premature nature of petitioner's interlocutory challenge, which might not ultimately turn on "the *lifetime* value of the property" (Pet. 31) to which petitioner now objects.

[4] Petitioner attempts (Pet. 32) to distinguish *Tahoe-Sierra* on the ground that the claimants there alleged a "categorical" taking rather than a regulatory taking. But defining the relevant property interest is necessary for both kinds of claim, and this Court has applied the "parcel as a whole" rule in evaluating regulatory-taking claims. See *Concrete Pipe & Prods.*, 508 U.S. at 643-644.

4. Petitioner argues (Pet. 24-27) that the Federal Circuit's regulatory-taking analysis in *Cienega X* conflicts with this Court's decisions because it too rigidly requires the CFC to address all three *Penn Central* factors. Contrary to petitioner's contention (Pet. 27), an instruction to consider the evidence relevant to each of the three key *Penn Central* factors is fully consistent with the "flexible, ad hoc nature of the *Penn Central* analysis" and with this Court's holdings in *Hodel* v. *Irving*, 481 U.S. 704 (1987), and *Kaiser Aetna* v. *United States*, 444 U.S. 164 (1979). Neither of those decisions suggests that a court's analysis must cease before all three factors have been evaluated if a single factor strongly indicates that a taking has occurred. To the contrary, the Court in *Hodel* analyzed all three *Penn Central* factors before concluding that the plaintiffs had established a taking because the "character of the Government regulation" was sufficiently "extraordinary" to outweigh weaker showings on the other factors. 481 U.S. at 714-717. The Court in *Kaiser Aetna* also analyzed "[m]ore than one factor"—including the presence of "an actual physical invasion of [a] privately owned marina"—before finding a taking. 444 U.S. at 178, 180; see *id.* at 178 n.9 (declining to decide "whether in some circumstances" any "factor[] by itself may be dispositive" of the regulatory-taking analysis).

In any event, as explained above (pp. 8-9, *supra*), no court has yet applied the Federal Circuit's guidance in *Cienega X* to petitioner's own circumstances. Petitioner therefore cannot contend that the Federal Circuit's directive to consider all three *Penn Central* factors has actually affected the outcome of this case; petitioner's argument instead is that this aspect of the *Cienega X*

opinion *might* lead to an erroneous decision on remand. Whatever its merits, that argument is premature.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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